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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO.

TIMOTHY CRAIG BROOKS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Timothy Craig Brooks prays that a writ of certiorari issue to review the decision of the Court of Appeals of Georgia sustaining his conviction of selling marijuana, as to which a Motion for Rehearing was subsequently denied. Certiorari was denied by the Supreme Court of Georgia and that Court subsequently denied a Motion for Rehearing.

OPINION BELOW

The six to three decision of the Court of Appeals of Georgia, printed in Appendix A, *infra.*, is at 125 Ga. App. 867, ____S.E.2d____. The denial of the Motion for Rehearing is noted at 125 Ga. App. 870, ____S.E.2d____. The actions of the Supreme Court of Georgia were without opinion and are unreported.

JURISDICTION

The decision of the Court of Appeals of Georgia was entered on March 17, 1972. Timely application for rehearing, filed on May 27, 1972, was denied on March 31, 1972. Notice of certiorari to the Supreme Court of Georgia was duly given on April 5, 1972, and the petition for certiorari was duly filed. Certiorari was denied by the Supreme Court of Georgia on May 18, 1972 and a Motion for Rehearing was duly filed on May 25, 1972, and denied on June 15, 1972.

The jurisdiction of the Court is invoked under 28 U.S.C. §1257 (3) since rights, privileges and immunities were set up and claimed under the Constitution of the United States and are believed to have been improperly denied by the highest court of the State of Georgia.

QUESTIONS PRESENTED

1.

Does due process demand a finding of entrapment when agents of the state concededly induced a person to commit a criminal act he would not have committed otherwise.

2.

Does the right to privacy guaranteed by the Ninth Amendment to the United States Constitution preclude the state from convicting a defendant whom officers of the state induced to engage in criminal acts which the defendant would not have committed except for the conduct of such officers of the state or their agents.

3.

Does due process require that a defendant have the right to have the jury charged on the defense of "procur-

ing agent" when the evidence in a prosecution for the sale of marijuana shows that the defendant was acting upon the request and on behalf of the police (acting undercover) and that the defendant derived no benefit from the transaction as he did not sell the marijuana but only bought it from another for the police.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Ninth Amendment

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner moved to dismiss the charge against him (of selling marijuana) on the ground that the evidence showed that at most he was an agent of the *buyer* (T-63). The motion was denied, as was a motion to dismiss on the grounds petitioner was entrapped. Petitioner's proffered charge (No. 2) that he should be acquitted

of the charge of selling if the evidence showed him to be a "procuring agent" of the police was also denied.

Petitioner, a twenty year old, and his wife were tried for allegedly selling a pound of marijuana to undercover police officers (violation of the Georgia Drug Abuse Control Act, Ga. Code Ann. §26-801). His wife was acquitted and petitioner received a penitentiary sentence.

The officers utilized several young women who had previously attempted to help them set up a "buy" of drugs from another person. That purchase fell through, and the women contacted petitioner to see if he could help them get some marijuana for the officers. They first called petitioner on the telephone and he said he "didn't want to mess with it." But then they, accompanied by and on behalf of the officers, went to petitioner's apartment. The women were persistent and shuffled in and out of petitioner's apartment several times, with the officers remaining outside in their car, before they were able to get petitioner to help. Petitioner testified that "They just came to my house and made me feel real bad that I didn't help some freaks [hippies] out . . . and they pushed me into it." One of the officers conceded in his testimony that petitioner did not want to participate and that he was "reluctant to get involved in this matter."

Petitioner then called another person, one Charles Wofford, to see if he had or knew where to get some marijuana. A probable price of $175 a pound was mentioned. Thereafter petitioner went with one of the officers and others to Wofford's apartment to attempt to make the purchase. Petitioner went by himself into Wofford's apartment. As petitioner left the officer to go into Wofford's apartment, the officer gave him $175, telling him to haggle to "see if we could get the price down some."

This officer conceded in his testimony that petitioner was acting "more or less as [his] agent to try to haggle the price down."

Wofford then came down to the car and went with the group to another location where, after an initial failure to make contact, another person appeared and delivered a bag containing what turned out to be nine-tenths of a pound of marijuana. Petitioner had previously returned $10 to the officer. Wofford gave the supplier of the marijuana $155, handing $10 more back to the undercover officer. Neither petitioner nor his wife received any part of the money. No witness for the State suggested that petitioner received any of the marijuana or any of the money, or any profit, for his participation in the transaction. In addition to the officer's testimony as to the reluctance of petitioner to become involved, petitioner and his wife testified under oath of petitioner's resistance. The wife also stated without rebuttal that at Wofford's she wanted to go get her husband, "to come on and let's just go, you know, to forget about it and [Officer] Webb would not let me."

The State argued to the jury over due process objection that anyone "concerned" with the commission of a crime was guilty of it within the meaning of 26 Ga. Code §801 (T-70,103). It also argued to the jury, and the trial court charged, over objection, the law regarding conspiracy.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT AND IS THEREFORE INCORRECT.

The decisions of this Court under its supervisory power forbid officers of the State to persistently solicit citizens

to commit crimes in the face of the citizen's obvious reluctance and then to prosecute them for those crimes.

There is a great need for this Court to apply due process standards to the defense of entrapment in drug cases. Our nation's youth are quite familiar with the use of drugs and where mind altering substances can be obtained. Marijuana and other prohibited substances are commonly used in our high schools and colleges. This common availability of information regarding where illegal drugs can be obtained make our young people easy prey for the beguiling undercover agent who is seeking to fill his quota of drug convictions. (All the young women in this case and Wofford were indicted—the actual seller got away!)

Some lower federal courts and state courts have held that entrapment is violative of the commonly accepted standards of fundamental fairness enunciated by the due process clause and the cases interpreting it. See e.g., *United States v. Chisum*, 312 F.Supp.1307, 1312 (C.D. Calif. 1970); *Grossman v. State*, 457 P.2d 226 (Alas. 1969). This Court has held that in convicting a citizen for exercising a privilege which the State had clearly told him was available to him violated the Due Process Clause of the Fourteenth Amendment as it is "... an indefensible sort of entrapment ..." *Raley v. Ohio*, 360 U.S. 423, 425-426 (1958); *Cox v. Louisiana*, 379 U.S. 559, 571 (1965). The separate opinions in *Sherman v. United States*, 356 U.S. 369 (1958) (Frankfurter, J.,) and *Sorrells v. United States*, 287 U.S. 435 (Roberts, J.) state that the foundation of the entrapment defense should be due process rather than *policy* consideration or statutory interpretation.

The motion that entrapment-like conduct is not conducive to fair enforcement of criminal law is closely

analagous to the other extensions of substantive due process by this Court. *E.g., United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Malloy v. United States*, 354 U.S. 449 (1957). Protection from such conduct by officers of the state should be extended through the guarantee of fair enforcement of law contained in the concept of due process. E.g., Taylor, "The Defense of Entrapment: Next Move—Due Process?," 1971 Utah L. Rev. 266, 271-274 (Summer 1971); Elrlich, "The Defense of Entrapment and the Due Process Analysis," 43 U.Colo.L.Rev. 127 (May 1971); Sherrill, "The Defense of Entrapment: A Plea for Constitutional Standards," 20 U.Fla.L.Rev.63, 67-72 (Summer 1967); Note, "The Serpent Beguiled Me and I Did Eat. The Constitutional Status of the Entrapment Defense," 74 Yale L.J. 942 (1965).

The evidence at bar is on all fours with that of *Sherman v. United States*, 356 U.S. 369 (1958), where this Court held that entrapment is established when the testimony of the prosecution's witnesses show that sales of narcotics were brought about by the informer's persistent solicitation in the face of obvious reluctance on the part of the accused. The facts in the case at bar clearly indicate that the criminal design originated with the policemen and not with the petitioner. Entrapment occurs, as a matter of law, when the criminal design originates with the officials of the State and not with the accused. *Sorrells v. United States*, 287 U.S. 435, 442.

Permitting such activity by officers of the state should not be condoned by the Courts. The method employed on behalf of the State to bring about petitioner's conviction cannot be countenanced. Mr. Justice Frankfurter stated that such "police conduct is not to be tolerated by

an advanced society." *Sherman v. United States*, 356 U.S. 369, 383. He went on to say that, "The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime. . . . Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime." *Id.* at 384.

The activity of the undercover officers in the case at bar violated petitioner's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. It also violated petitioner's right to privacy and his right to be free from unlawful interference from the State as guaranteed by the Ninth Amendment to the United States Constitution. Cf. *Mapp v. Ohio*, 367 U.S. 643; *Elkins v. United States*, 364 U.S. 206; *Feldman v. United States*, 322 U.S. 487. Mr. Justice Douglass stated in *Osborn v. United States*, 385 U.S. 323, 343-344 (separate opinion) that, entrapment is merely a facet of a much broader problem. Together with illegal searches and seizures, coerced confessions, wiretapping, and bugging, it represents lawless invasion of privacy. It is indicative of a philosophy that the "ends justify the means."

In *Mapp v. Ohio*, 367 U.S. 643, this Court extended the exclusionary rule prohibiting "unreasonable search and seizures" to state criminal trials on the underlying conviction that the Court can identify enforcement procedures that abuse fundamental rights and guarantee those rights by establishing minimum standards of police behavior on those enforcement procedures. Taylor, "The Defense of Entrapment: Next Move—Due Process?" 1971 Utah L.Rev. 266, 273 (Summer 1971). Similar judicial protection should be taken to ensure that police

enforcement procedures are not over stepped in the area of entrapment.

II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THE LOWER FEDERAL COURTS AND MOST OTHER STATE COURTS.

The State courts are split on whether merely acting as a "procuring agent" is a defense to the charge of selling unlawful drugs. E.g., *Smith v. State*, 396 S.W.2d 876, 878-879 (Tex. Ct.App. 1965) (and cases cited therein); *State v. Jacobson*, 15 Ariz. App. 604, 490 P.2d 433, 435 (Ariz. 1971) (and cases cited therein.) *Brooks v. State*, 125 Ga.App. 867, ____SE 2d____(1972). But the lower federal courts recognize the defense. E.g., *Lewis v. United States*, 119 U.S.App. D.C. 145, 337 F.2d 541 (1964) *certiorari denied* 381 U.S. 920 (1965); *United States v. Prince*, 264 F.2d 850 (3d Cir. 1959); *Henderson v. United States*, 261 F.2d 909, 912 (5th Cir. 1958); *United States v. Valdes*, 229 F.2d 195 (2nd Cir. 1956); *Bruno v. United States*, 259 F.2d 8 (9th Cir. 1958).

The facts in the record and set forth above demand a different result from that rendered by the courts below. The undisputed evidence shows that petitioner was not a seller but rather that he was an agent of the undercover police *buyer* in making the marijuana purchase and agreeing on the price in the case at bar. The money was furnished by the state witnesses; petitioner made no profit therefrom and the entire transaction was at the suggestion and instigation of the state's witnesses who were disguised policemen. Petitioner did not even know the ultimate supplier at the time he was approached. The police officer conceded, under oath, that petitioner was the officer's

agent. No witness for the State suggested that petitioner received any of the marijuana or any of the profit, or any of the money for his participation in the transaction.

The Fourteenth Amendment to the United States Constitution states that no person shall be deprived of life, liberty or property without due process of law. State action which is "fundamentally unfair" constitutes a violation of due process. It is fundamentally unfair to permit officers of the State to persistently solicit citizens to commit crimes in the face of the citizens' obvious reluctance and then prosecute them for those acts.

The Ninth Amendment to the United States Constitution guarantees that the people retain the right to be free from invasions of their personal privacy. This Court has held that evidence which has been seized unlawfully must be suppressed. *Mapp v. Ohio*, 367 U.S. 643. Although the *Mapp* decision rested on the Fourth Amendment, "[t]he philosophy of each Amendment and of each freedom is complimentary to, although not dependent upon that of the other . . ." *Id.* at 657. The Amendments enacted in the Bill of Rights "express 'supplementing phases of the same constitutional purpose—to maintain inviolative large areas of personal privacy.' *Feldman v. United States*, 322 U.S. 487, 489-490 (1944)." *Mapp v. Ohio*, 367 U.S. 643, 657. This Court has also stated that, "The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in the concept of ordered liberty and as such enforceable against the states through the Due Process Clause." *Elkins v. United States*, 364 U.S. 206, 213 (1960). Citizens must be protected against the invasion of their privacy by overzealous police officers who convince them to commit crimes they would not otherwise commit.

The federal courts have held that the defense of "procuring agent" is a valid defense to the charge of illegal sale of drugs, indicating that it is fundamentally unfair to convict someone of selling an illegal substance who is acting at the instance of the buyer, a disguised officer. *Henderson v. United States*, 261 F.2d 909, 912 (5th Cir. 1958); *Adams v. United States*, 220 F.2d 297 (5th Cir. 1955). "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." *Elkins v. United States*, 364 U.S. at 221.

The evidence demanded a verdict for petitioner on the ground that he was entrapped into participating in the alleged "crime" of which he was convicted. If ever there was an instance when one would not have committed a "crime" except for police urging, the present case is such.

III. THE CASE IS OF MAJOR IMPORTANCE TO SECURE NATIONAL RIGHTS AND UNIFORMITY OF JUDGMENT.

Despite this Court's decisions in the entrapment area, some state courts still give spotty regard to the Court's pronouncements. If the *Sherman* and *Sorrells* cases are to have continuing validity, it is urgent that the Court apply them to the circumstances of this case.

The decisions of the lower federal courts should be applied to the states so as to provide uniformity of law and due process in the defense of state drug cases.

CONCLUSION

The petition for a Writ of Certiorari should be granted and the judgment below reversed for the above stated reasons.

Respectfully submitted,

ALBERT M. HORN

Suite 822
15 Peachtree St., N.E.
Atlanta, Georgia 30303
524-6878 (404)

CERTIFICATE OF SERVICE

I certify that I duly mailed copies of the foregoing petition for a Writ of Certiorari to Hon. Arthur Bolton, Attorney General of Georgia, State Judicial Building, Atlanta, Georgia, and Hon. Lewis Slaton, District Attorney, Fulton Superior Court, Fulton County Courthouse, Atlanta, Georgia on September____, 1972.

ALBERT M. HORN

APPENDIX A

46834. *BROOKS v. THE STATE*

EBERHARDT, Judge. Two members of the narcotics squad of the Atlanta metro police force made acquaintance with some girls who were used as entrees for making contacts with sellers of drugs. The officers expressed a desire to buy a pound of marijuana, and the girls took them to the apartment of defendant and his wife. He had none, but at the urging of the girls called several people in an attempt to locate marijuana for them. Defendant demurred somewhat, but finally he and his wife went with the girls and the officers to a location where defendant made a contact which produced substantially a pound of marijuana wrapped in a newspaper. It was to be obtained for $165, and $10 of the $175 supplied by the officers was returned. When the marijuana was produced the price was again reduced $10 because it was "trashy" and another $10 was refunded to the officers. Defendant and his wife kept none of the money but were prosecuted under *Code Ann.* §26-801 for selling the marijuana and on trial of the case she was acquitted while he was convicted and sentenced to serve six months. He now appeals. *Held:*

1. The contention that defendant was entitled to an acquittal because he had acted as an agent of the purchasers in acquiring the marijuana is without merit. The same contention was made in *Green v. State*, 124 Ga. App. 469 (184 SE2d 194) under similar circumstances.

2. There was no entrapment. *Allen v. State*, 120 Ga. App. 533, 535 (171 SE2d 380).

3. In the charge to the jury the court informed the jury

that the offense charged in the indictment was that of a violation of the Georgia Drug Abuse Control Act, and "the court charges you the law provides that it shall be unlawful for any person to possess or have under his control any narcotic drugs except as authorized" by the Act. There was no instruction as to a conviction or acquittal for the unlawful possession of drugs. But the indictment charged the defendant with the offense of selling one pound of marijuana to L. O. Webb; it did not charge unlawful possession.

There was explicit charge on the matter of selling: "The court charges you if you believe beyond a reasonable doubt . . . that the defendants did on the 3rd day of March, 1971, not being authorized under any provision of the Georgia Drug Abuse Control Act to do so, did unlawfully sell one pound of marijuana to L. O. Webb, then and in that event, you would be authorized to convict the defendants of the offense charged in this bill of indictment," and that if they should have a reasonable doubt as to their guilt "of the offense charged in this bill of indictment, it would be your duty to give them the benefit of that doubt and to acquit them." Throughout the charge there were references to the "offense as charged in this indictment."

It is urged that the reference to possession in the charge was calculated to confuse the jury, but we do not agree. It would have been better to have omitted the reference, but upon a reading of the whole charge we can see no harm in it. There was never an indication or instruction that the jury might convict for unlawful possession, and the tenor of the whole charge was that they were being tried for selling marijuana in a specific quantity on a specific date to a specific party. The jury made no effort

to deal with any other offense than that charged in the indictment.

"The intent and the reasonable construction of the charge was to inform them that the indictment charged selling and not possessing, and that their verdict must determine the defendant's guilt or innocence of the charge of selling as alleged in the indictment, and not of the charge of possessing. The fact that the indictment charged selling only takes the case out of the rulings cited by the plaintiff in error. The defendant was not injured by the charge, and 'injury as well as error must be shown before a new trial will be granted.' " *Christian v. State*, 41 Ga. App. 565, 566 (153 SE 780).

4. For the reasons stated in Headnote 1 there was no error in denying a request to charge on a defense that the defendant had been a "procuring agent" for the officer.

5. There was no error in the charge on conspiracy. There was a definition of conspiracy and an instruction that it was for the jury to determine from all of the facts and circumstances, as shown by the evidence, whether one existed for the commission of the offense charged in the bill of indictment, and, if so, whether the defendants were parties thereto, and that if the jury should find no conspiracy, or, that one existed but that defendants were not parties thereto, they should disregard the charge on that subject. We think the evidence raised a factual issue as to whether there was a conspiracy, and of course if the jury should find it to have existed and that the defendant was a party to it, as they may very well have done, the law makes the acts of all parties the acts of each.

6. The general grounds of the motion for new trial are without merit. We have dealt with the special grounds.

Judgment affirmed. Bell, C. J., Jordan, P. J., Hall, P. J., Quillian and Clark, JJ., concur. Pannell, Deen and Evans, JJ., dissent.

ARGUED JANUARY 4, 1972—DECIDED MARCH 17, 1972—

REHEARING DENIED MARCH 31, 1972—CERT. APPLIED FOR.

Drug violation. Fulton Superior Court. Before Judge Wofford.

Albert M. Horn, for appellant.

Lewis R. Slaton, District Attorney, Carter Goode, Robert L. Ridley, Joel M. Feldman, for appellee.

EVANS, Judge, dissenting. One of the principal defenses offered by defendant was that he had no interest whatever in the transaction surrounding the purchase of marijuana, and that certain persons (later identified as policemen) came to him and induced him to buy marijuana for someone who badly needed some. He contended that he was not "concerned" in the sale and was not the agent of the seller, but that he was the agent of the purchaser.

The defendant contended that he did not make any profit from the transaction; that the money used to purchase the drugs was furnished by the policemen; and that his sole purpose in participating in the transaction was: "They just came to my house and made me feel real bad that I didn't help some freaks out . . . and they pushed me into it." No witness for the State suggested that defendant received any of the marijuana or any of the money, or any profit, for his participation in the transaction.

In support of defendant's contention that he was agent for the purchaser (the policemen) it is highly significant

that the record in this case shows that when officer L. O. Webb (a witness for the prosecution) was testifying, the following question and answer were given: "Q. In other words, you were asking him (defendant) more or less *as your agent*, to try to haggle the price down for you, is that right? A. *That's correct*. $175 was a little bit high to what we had been paying for it." (Tr. 22, 23) (Emphasis supplied).

Counsel for defendant, timely submitted a request in writing for the court to charge the jury as follows, to wit: ". . . the defense of 'procuring agent' exists where the purchase of drugs was made at the direction of an agent of the State who paid for the drugs and where the defendant made no profit from the sale in question. Thus, if you believe under all the facts and circumstances of this case that the defendant purchased drugs because of the direction of an agent of the State who paid for the drugs and that the defendant made no profit either in money or in kind from the transaction complained of, it would be your duty to acquit the defendant of the crime with which he is charged."

It was error for the court to fail to give this charge, in substance, whether written request was filed or not, because this was a defense relied on by defendant, and there was ample evidence to support the theory of agency for the State.

In United States v. Sawyer, 210 F2d 169 (a Federal case quite similar to the facts in this case), the United States Court of Appeals, Third Circuit, reversed the lower court for failing to charge on the question of agency, which was shown by the facts there just as it was shown in this case. That court ruled that in a prosecution for unlawful sale of narcotics, the jury should have been instructed

that, if they believed that the Federal agent had asked defendant to get some heroin for the agent, and thereupon the defendant undertook to act in behalf of the Federal agent, as prospective purchaser, rather than on his own behalf, and, in doing so, purchased the drug from a third person with whom defendant was not associated in selling, defendant would not be a seller of such drugs which he delivered to the agent and could not be convicted. The case sub judice is even stronger in that the evidence shows that defendant acted as agent for the State in making the purchase and agreeing on the price (admitted by State's witness); that the money was furnished by the State's witnesses; that defendant did not make any profit therefrom; and that the entire transaction was at the suggestion and instigation of State's witnesses, who were policemen in disguise; that defendant did not himself sell the drugs but found someone else who did sell them.

In the opinion of Judge Hasty, in the Sawyer case, supra, at page 170 we find the following: "In these circumstances, we think the court should at least have pointed out to the jury that if they believed that the federal agent asked the defendant to get some heroin for him and thereupon the defendant undertook to act in the prospective purchaser's behalf rather than his own, and in so doing purchased the drug from a third person with whom he was not associated in selling, and thereafter delivered it to the buyer, the defendant would not be a seller and could not be convicted under this indictment. This may be obvious to a lawyer, but we are not sure that in the circumstances of this case the distinction between a seller and a procuring agent was equally clear to laymen. The government having elected to charge the defendant with the crime of sale rather than illegal possession, the jury should

have been alerted to the legal limitations of the sale concept in relation to the circumstances of this case."

It is noted that in the later cases of Adams v. United States, 220 F2d 297, and Henderson v. United States, 261 F2d 909, the Sawyer case was cited and followed by the Fifth Circuit to the point of reversing, and in Sawyer with direction to enter a verdict of acquittal. I do not feel that this court should go so far and remove the question from the jury. The law of this State is somewhat different from that of the Federal government; and the issue created by the evidence as to whether the accused is the agent of the buyer or the agent of the seller, or is otherwise "concerned" by intentionally aiding or abetting the commission of a crime remains. See *Code Ann.* (New Criminal) § 26-801 (Ga. L. 1968, pp. 1249, 1271). The appellate courts of this State have uniformly held that the charge of the judge to the jury must give the law of the case to the extent of covering the substantial issues made by the evidence, whether such instructions are requested or not. See *Central R. v. Harris,* 76 Ga. 501, 511; *Southern Cotton Oil Co. v. Brownlee,* 26 Ga. App. 782 (2) (107 SE 355); *Van Valkenburg v. Wood,* 41 Ga. App. 564 (1) (153 SE 924); *Anderson v. Barron,* 208 Ga. 785 (4) (69 SE2d 874); *Kresge Co. v. Carty,* 120 Ga. App. 170 (2) (169 SE2d 735); *Davis v. Hammock,* 123 Ga. App. 33, 36 (179 SE2d 283). The instruction requested was clearly apt and should have been charged.

In view of the foregoing, I dissent from Headnote 4 of the opinion of the majority and from the judgment of affirmance. While it is an extremely close question as to whether the evidence was sufficient to convict, I prefer to premise my dissent on the failure to give a proper charge on one of defendant's principal defenses.

The accused was entitled to "the procuring agent defense" and, at the very least, he was entitled to a correct charge on that principle, whether requested in writing or not. The lower court clearly erred in refusing to give such charge, after it was requested in writing, and in my opinion the judgment of conviction should be reversed and a new trial ordered.

I am authorized to state that Judges Pannell and Deen concur in this dissent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 72-410

TIMOTHY CRAIG BROOKS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

SUPPLEMENTAL APPENDIX

GEORGIA SUPREME COURT NOTICE DENYING CERTIORARI

Clerk's Office, Supreme Court of Georgia
Atlanta 30334, May 18, 1972

Dear Sir:

Case No. *27281, Brooks v. State*

The Supreme Court today *denied* the writ of certiorari in this case.

Jordan, J. disqualified.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

GEORGIA SUPREME COURT
NOTICE DENYING REHEARING

Clerk's Office, Supreme Court of Georgia
Atlanta 30334, June 15, 1972

Dear Sir:

Case No. *27281, Timothy Craig Brooks v. The State*

The motion for reconsideration was *denied* today.

Jordan, J. Disqualified.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

CERTIFICATE OF SERVICE

I certify that I duly mailed copies of the foregoing Supplemental Appendix to Hon. Arthur Bolton, Attorney General of Georgia, State Judicial Building, Atlanta, Georgia, and Hon. Lewis Slaton, District Attorney, Fulton Superior Court, Fulton County Courthouse, Atlanta, Georgia on September ____, 1972.

ALBERT M. HORN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-410

TIMOTHY CRAIG BROOKS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

I.

THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

In the last generation this Court has had entrapment under consideration in: *Sorrells v. United States*, 287 U.S. 435(1932); *Sherman v. United States*, 356 U.S. 369(1958); *Masciale v. United States*, 356 U.S. 386 (1958); *Lopez v. United States*, 373 U.S. 427 (1963); *Osborn v. United States*, 385 U.S. 373(1966); incidentally only, in *Lewis v. United States*, 385 U.S. 206(1966).

The decision below is entirely consistent with these decisions.

It has never been contended that the defense of entrapment was not properly and fairly submitted to the jury by the trial court. There has never been any contention that any evidence of past crimes was admitted during the first phase of the trial, when only guilt was in issue.

There is no contention that the rules being applied by the Georgia courts relating to the defense of entrapment are not in consonance with those applied by this court, and, for that matter, the lower Federal Courts and the courts of the other states.

Accordingly, the Petitioner fails to make the showing required by Rule 19(b). The decisions cited seem to settle any Federal question that might be said to have been decided by the Georgia courts.

Respondent concurs in what is said in the petition (p. 6) about drugs and high school and college students, but concludes that even the best intentioned attacks upon police officers tend to divert attention from the persons supplying drugs to high school and college students—even to grammar school students who have the price. This case certainly shows no offensive conduct.

Lewis v. United States, 385 U.S. 206(1966), already cited, is authority that this case does not involve any breach of privacy. The Petitioner was merely encouraged to say and do things which he was willing to say and do to and for anyone who would be interested in purchasing marijuana.

II.

THE DECISION BELOW IS NOT INCONSISTENT WITH THE DECISIONS OF THE LOWER FEDERAL COURTS AND MOST OTHER STATE COURTS, AND INVOLVES ONLY THE CONSTRUCTION OF GEORGIA LAW.

Under this heading Brooks argues that the fact that in a transaction involving a sale of drugs one acts as a "procuring agent" only prevents criminal liability from attaching and that the jury trying him should have been so instructed, relying upon certain decisions by lower Federal and State Courts, and the due process clause of the Fourteenth Amendment.

The so called "procuring agent" or "purchasing agent" theory apparently had its origin in *Sawyer v. United States*, 210 F.2d 169 (3 Cir. 1954) where Judge Hastie without giving any reason or citing any authority applied the civil law principles relating to sales to a federal law prohibiting the sale of drugs. In *Adams v. United States*, 220 F.2d 297 (5 Cir., 1955), the court followed *Sawyer* without discussion. In *Henderson v. United States*, 261 F.2d 909 (5 Cir., 1958) the court (one dissenting) purported to follow *Sawyer* and *Adams*, but stated in immediate conjunction that since the defendant acted at the instigation of a government agent she shared his immunity.

In truth, all that *Sawyer* stands for is that the federal law under which the prosecution was had was strictly construed and so construed to authorize a conviction all elements of a sale, including a consideration moving to the defendant, must be proved. *Adams* and *Henderson* stand for no more. In *Henderson* the court apparently

seeks to introduce an immunity theory, but a reading of the decision discloses that entrapment was the turning point.

The correct view of the matter commences with the elementary proposition that under the police power of a state, it can constitutionally prohibit the buying, selling, or possession of drugs, or any act in furtherance of either.

Further, the construction of a state law is for the courts of the state. See *Perez v. Campbell*, 91 S.Ct. 1704 (1971).

In *Lewis v. United States*, 337 F.2d 541, 119 U.S. App. D.C. 145(1965) the federal decisions are collected and the court points out that other Federal laws in the drug field have been given a broader construction than that in *Sawyer*, *Adams*, and *Henderson*. In a footnote (n. 4, 337 F.2d at p. 543) it is said that "The purchasing agent theory, rather than constituting a defense—derives from a defendant's right to an instruction on all elements that must be proved to establish the offense charged."

The decisions by state appellate courts cited by applicant construe the term "sale" in the Uniform Narcotic Drug Act. It appears from these cases that the term is given a strict construction by the courts of Massachusetts, New York, and Texas, and a broad construction by the courts of Arizona, Illinois, New Jersey and North Dakota.

The Georgia Court of Appeals has simply adopted a broad construction of the term "sell" in the Georgia Drug Abuse Control Act (Ga. Code Ann., Sec. 79A 907 (b)).

The dissenting judges recognized that Ga. Code Ann., Sec. 26-801, is in pari materia. This section provides, in pertinent part:

"26-801. *Parties to crime; punishment.*—(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

"(b) A person is concerned in the commission of a crime only if he: . . . (3) intentionally aids or abets in the commission of the crime; . . . ."

These same dissenters did not, apparently, recognize that the requested instruction upon the "defense" of "procuring agent" severely limited the application of the provision as to persons aiding and abetting in the selling.

In summary, we have only a matter of statutory construction here, which is for the Georgia Courts.

III.

NO SHOWING OF MAJOR IMPORTANCE TO SECURE NATIONAL RIGHTS AND UNIFORMITY OF JUDGMENT IS MADE BY PETITIONER.

Petitioner states by way of conclusion that "some state courts still give spotty regard to the courts pronouncements (in the *Sorrells* and *Sherman* cases, heretofore cited). As we have already stated in substance, the lower Federal Courts and the state courts appear to be in accord with these decisions.

CONCLUSION

The writ should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carter Goode, hereby certify that I have this day deposited three copies of the within and foregoing brief in response to petition for the writ of certiorari in a United States mail box, with first class postage prepaid, addressed to Albert M. Horn, Esq., counsel of record for Timothy Craig Brooks, petitioner, at his address of record, Suite 822, 15 Peachtree Street, N.E., Atlanta, Georgia 30303.

This ____ day of December, 1972.

CARTER GOODE
Of Counsel for State
of Georgia